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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JANE DOE, Plaintiff and Appellant, v. CHANNEL FOUR TELEVISION CORPORATION, Defendant and Respondent.	B217145 (Los Angeles County Super. Ct. No. SC092739)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry B. Friedman, Judge. Affirmed.

Victor J. Daniels for Plaintiff and Appellant.

Smithdehn, Russell Smith; Law Offices of Theodore F. Monroe and Theodore F. Monroe for Defendant and Respondent.

* * * * * * *

The trial court granted summary judgment in favor of defendant and respondent Channel Four Television Corporation (Channel 4) on plaintiff and appellant Jane Doe's complaint which alleged multiple causes of action stemming from a comedy show broadcast. In the show, a fictional character stated that he used to have a relationship with a woman having appellant's name; the character made several derogatory statements about the woman. The trial court ruled that summary judgment was warranted because the allegedly defamatory statements could not reasonably be understood as assertions of fact and because appellant had earlier released the claims she sought to allege.

We affirm. On the basis of the undisputed evidence concerning the statements' language and the context in which the statements were made, we conclude that no reasonable viewer could have understood the statements as implying provably false assertions of fact.

FACTUAL AND PROCEDURAL BACKGROUND

***Statements Giving Rise to this Action*.**

In 1987, appellant met Sacha Baron Cohen (Cohen) during a British Jewish youth group trip to Israel. The two maintained a friendship—though not a romantic or sexual relationship—for a period of time after the trip, but then lost touch with each other. Appellant noticed that over the years Cohen had become a successful comedian.

Da Ali G Show (program) is a comedy series featuring comedian Cohen, who portrays the fictional character "Ali G." In the program, the Ali G character is a white man who is a "wannabe" black gangster rapper and who conducts spoof interviews with prominent experts on varied topics by posing a steady stream of ridiculous comments and obviously false statements to the program guests. Channel 4, a government owned and commercially supported public service broadcaster in the United Kingdom, was the original broadcaster of the program in the United Kingdom. Home Box Office, Inc. (HBO) commissioned and distributed a version of the program for the United States, providing Channel 4 with the rights to distribute the program outside the United States as a foreign licensee.

During one episode of the program originally broadcast on August 15, 2004 (episode), Ali G interviewed Gore Vidal (Vidal) regarding the United States Constitution and Amendments thereto. In the course of that discussion, Ali G referred to appellant by her full name, stating: "'Ain't it better sometimes, to get rid of the whole thing rather than amend it [the Constitution]? Cos like me used to go out with this bitch called [appellant's name] and she used to always trying [to] amend herself. Y'know, get her hair done in highlights, get like tattoo done on her batty crease, y'know, have the whole thing shaved—very nice but it didn't make any more difference. She was still a minger and so, y'know me had enough and once me got her pregnant me said alright, laters, that is it. Ain't it the same with the Constitution?" During the episode, Ali G also stated that Vidal was a world famous hairstylist and that the Constitution was written on two stone tablets with Moses's involvement. In other portions of the same episode Ali G stated that Denzel Washington lived in George Washington's former Mount Vernon home; that John Paul Jones had no arms or legs; that the world is running out of gravity, which was discovered by "Sir Isaac Newton-John" after shooting an apple from William Tell's head; that euthanasia means the killing of elderly people by youth in Asia; and that Ali G's face was added to Mount Rushmore. HBO broadcast the episode 21 times in the United States.

According to appellant, the statements referring to her were false. Seven to eight individuals informed appellant of the broadcast, and she watched it herself. She suffered extreme shock, bewilderment and upset causing her physical pain after she saw the episode. Appellant, who worked in public relations, also suffered embarrassment when the media and certain clients later commented to her about the episode.

In November 2004, appellant and HBO entered into a settlement agreement and release (2004 release) whereby appellant received a $40,000 payment and released HBO and its "distributors, assigns and licensees . . . and agents . . . who participated in the production, broadcast, transmission or dissemination of the Program" from "any and all claims . . . whether known or unknown, now or in the future, arising out of or related to the Program . . . ." Appellant further agreed to "refrain and forebear from commencing,

instituting or prosecuting any lawsuit, action or other proceeding against [the released parties] arising out of or connected to" the program; she further waived her rights under Civil Code section 1542. The 2004 release preserved appellant's right to bring an action "'against any person or entity who unlawfully broadcasts or otherwise disseminates any sound recording of [appellant's] name in the future. . . ." As part of the 2004 release, HBO agreed to edit the episode so that appellant's name would be inaudible.

Notwithstanding the 2004 release, HBO broadcast the unedited episode again in December 2005 through its on-demand service, Comcast. The broadcast resulted in the execution of a second settlement agreement and release in November 2006 (2006 release) which contained the same terms as the 2004 release and provided for a $50,000 payment to appellant.

Thereafter, the unedited version of the episode appeared on YouTube in January 2007. After Bernard MacMahon (MacMahon) saw the broadcast and recognized appellant's name, he contacted British journalist Tim Cooper (Cooper), who in turn informed appellant of the YouTube broadcast. Appellant learned that an individual in Estonia had downloaded the episode from Finnish television. Channel 4 had provided the unedited episode to Finnish television as part of a license agreement.

Pleadings and Summary Judgment Motion.

In February 2007, appellant filed her initial complaint against HBO and Cohen alleging multiple causes of action, including libel, slander, invasion of privacy, fraud, breach of contract, negligence, negligent misrepresentation and negligent infliction of emotional distress. She sought general damages and injunctive relief. In January 2008, appellant amended her complaint to add Channel 4 as a defendant.

Channel 4 moved for summary judgment on the grounds that appellant could not prove the requisite elements of her claims, including that no reasonable person could have understood the statements as factual, there was no proximate cause between the statements and any injury she suffered, and her damages were speculative. The motion was also based on the ground that appellant released her claims in the 2006 release. In

support of the motion, Channel 4 submitted pleadings, copies of the 2004 release and the 2006 release, declarations, discovery responses and appellant's deposition.

Appellant opposed the motion, asserting that triable issues of material fact existed concerning Channel 4's liability for broadcasts following its foreign distribution of the unedited program, whether Channel 4 breached the 2004 release, whether the releases were obtained by fraud and whether a reasonable person would have understood the statements as defamatory. In support of her opposition, appellant submitted her declaration and the declarations of her counsel, MacMahon and Cooper; the Finnish license agreement; discovery requests and responses; and articles and Internet postings about the lawsuit. She also filed evidentiary objections to Channel 4's evidence. In turn, Channel 4 filed evidentiary objections to much of appellant's evidence.

Following an April 21, 2009 hearing, the trial court issued an order granting summary judgment on two independent grounds. First, indicating it had personally viewed the episode, the trial court ruled that the statements could not reasonably be understood as statements of fact. "No reasonable person could consider the statements made by Ali G on the Program to be factual. To the contrary, it is obvious that the Ali G character is absurd and all his statements are gibberish and intended as comedy. The actor, Sacha Baron Cohen, never strays from the Ali G character, who is dressed in a ridiculous outfit and speaks in an exaggerated manner of a rap artist. Ali G's statements are similarly absurd. Altogether, the Program is obviously a spoof of a serious interview program. No reasonable person could think otherwise." Second, the trial court ruled that the 2006 release barred appellant's action, as it applied broadly to "any actions 'whether known, or unknown, now or in the future, arising out of or related to the Program,'" and appellant offered no evidence to show she relied on a fraudulent promise in executing the 2006 release. The trial court further issued specific rulings on appellant's and Channel 4's evidentiary objections.

Judgment was entered in July 2009 and this appeal followed.

DISCUSSION

Appellant contends the trial court erred in granting summary judgment, asserting that there were triable issues of fact precluding summary judgment on both grounds relied on by the trial court. She contends that a triable issue of fact existed as to whether a reasonable person could have considered the statements in the episode to be factual and susceptible of a defamatory meaning. She further contends that there were triable issues of fact as to whether the 2006 release applied to Channel 4, whether she intended to release Channel 4 from liability concerning the YouTube broadcast and whether the 2006 release was fraudulently procured. Her contentions lack merit.

I. Standard of Review.

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) The general rule is that summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) If there is no triable issue of material fact, "we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

Moreover, we are mindful of the principle that "[s]ummary judgment is a favored remedy in defamation and invasion-of-privacy cases due to the chilling effect of

protracted litigation on First Amendment rights. [Citation.] '[T]he courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. In the absence of such showing, the courts are inclined to grant the motion and do not permit the case to proceed beyond the summary judgment stage.' [Citations.]" (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1498–1499.)

Although we independently review a grant of summary judgment, we review the trial court's evidentiary rulings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) But in order to demonstrate an abuse of discretion, an appellant must affirmatively challenge the evidentiary rulings on appeal. That is, the asserted erroneous evidentiary rulings must be identified "as a distinct assignment of error" and be supported by analysis and citation to authority. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) Where, as here, the appellant does not challenge the trial court's sustaining objections to evidence offered in opposition to a summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded. [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

II. The Trial Court Properly Granted Summary Judgment on the Basis That, as a Matter of Law, the Challenged Statements Were Not Reasonably Susceptible of a Defamatory Meaning.

Appellant's first through third, sixth and eighth causes of action[1] were directly premised on the statements made by Ali G during the episode; appellant alleged that the statements were defamatory on their face, as they were false and exposed appellant to

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[1] In her opening brief, appellant expressly waived any challenge to judgment on her seventh cause of action for negligent misrepresentation.

hatred, contempt and ridicule. On summary judgment, Channel 4 argued that the statements could not be reasonably understood as statements of fact given that they were uttered by a fictional character as part of a series of absurd, comedic statements. In granting summary judgment, the trial court determined that the statements could not reasonably be understood as statements of fact and therefore were not actionable. We agree.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) "'The *sine qua non* of recovery for defamation . . . is the existence of a falsehood.' [Citation.]" (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259.) Thus, a claim for defamation fails unless the challenged statement can be reasonably understood to express or imply a provably false assertion of fact. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19–20; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607–1608; accord, *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 13 ["there is also constitutional protection 'for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual'"].)

Because of the falsity requirement, "'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of . . . contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection. [Citations.]" (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401.) As explained in *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385, "satirical, hyperbolic, imaginative, or figurative statements are protected because 'the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.' [Citation.]" (Accord, *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 849.)

"Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide." (*Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 385.) In resolving this question, courts employ a totality of the circumstances test, first examining whether the language of the statement has a

defamatory meaning and then considering the context in which the statement was made. (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1337–1338; *Franklin v. Dynamic Details, Inc.*, *supra,* at p. 386.) When determining whether a statement has a defamatory meaning, "'"a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.' [Citations.]" (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.) Equally as important, the court must carefully examine the context in which the statement was made, which means it must "look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. [Citation.] '"[T]he publication in question must be considered in its entirety; '[i]t may not be divided into segments and each portion treated as a separate unit.' [Citation.] It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader [citations], and construed in the light of the whole scope [of the publication]. . . . [Citation.]"'" (*Baker v. Los Angeles Herald Examiner*, *supra,* 42 Cal.3d at p. 261; see also *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064–1065 (*Monterey Plaza Hotel*).)

Applying these principles, we conclude that no reasonable viewer of the episode could have understood Ali G's statements in a defamatory sense.[2] Cohen uttered the statements while in character, pretending to be a gangster rap artist of a different race than his own. Because the statements purported to address a fictional character's prior relationship, a reasonable viewer could not have understood the statements to convey a provably false assertion of fact, but instead merely as a joke or parody. (*Couch v. San Juan Unified School Dist.*, *supra,* 33 Cal.App.4th at p. 1501.) The statements here are

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[2] As part of our review of the record, we have viewed the episode.

akin to those found not defamatory as a matter of law in *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543. There, the plaintiff wine distributer claimed that comedian Robin Williams defamed him during a comedy routine in which Williams referred to an individual with the plaintiff's name as part of a joke commenting on the existence of white and red wines but the absence of "Black wines" and adding disparaging comments about Black wines. (*Id*. at pp. 546–547.) The court ruled that the statements were not actionable, agreeing with the defendants that the "allegedly defamatory monologue 'is not actionable as a matter of law because an obvious joke, told during an obvious comedy performance, is a form of irreverent social commentary, is not taken seriously, and thus does not affect reputation in a manner actionable in defamation.'" (*Id.* at p. 551.)

Consideration of Ali G's statements in context confirms that the statements are not reasonably susceptible of a defamatory meaning. (See *Monterey Plaza Hotel, supra*, 69 Cal.App.4th at pp. 1064–1065.) The Ali G character made the statements during a comedy show in the context of an interview with Vidal involving a series of other comedic and sometimes crude statements that could not be reasonably understood as asserting actual facts. Ali G's "unremittingly facetious" statements included comments about Vidal's being a world famous hairstylist; Denzel Washington's living in George Washington's former Mount Vernon home; John Paul Jones being a quadriplegic; the world running out of gravity, which was discovered by "Sir Isaac Newton-John"; "euthanasia" meaning the killing of elderly people by youth in Asia; and Ali G's face being added to Mount Rushmore. (*Couch v. San Juan Unified School Dist., supra,* 33 Cal.App.4th at p. 1503.) Taken in context, a reasonable viewer would have no basis for distinguishing these satirical and imaginative statements from statements purporting to detail Ali G's prior relationship with a "minger." (See *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 326–327 [derogatory statements about and epithets directed to fictional movie character having the plaintiff's name not actionable]; *Polygram Records, Inc. v. Superior Court, supra*, 170 Cal.App.3d at pp. 556–557 [negative comments about a hypothetical wine made in jest as a small part of a long

comedy performance deemed "obvious figments of a comic imagination impossible for any sensible person to take seriously" and thus not actionable].)

We reject appellant's contention that whether Ali G's statements conveyed a defamatory meaning was a question of fact. She contends that she offered evidence to show that the statements were reasonably susceptible of an interpretation implying a provably false assertion of fact. But the evidence that appellant submitted suggesting that Ali G's statements were factual was comprised of articles and Internet postings that addressed her lawsuit—not the statements made during the episode. Moreover, the MacMahon and Cooper declarations failed to establish a triable issue of fact. Though MacMahon declared that appellant's name was so unusual he thought that Ali G's comments must refer to her, he did not declare that he assumed or believed the statements were factual. Cooper never heard or saw the episode and thus could not express any opinion as to whether he believed the statements implied provable assertions of fact.

In any event, the dispositive question must be resolved by considering, as a matter of law, whether the average viewer would interpret the material as conveying a provably false assertion of fact. (*Couch v. San Juan Unified School Dist., supra,* 33 Cal.App.4th at p. 1500.) As aptly explained in *San Francisco Bay Guardian, Inc. v. Superior Court* (1993) 17 Cal.App.4th 655, 660, the submission of declarations by individuals who did not understand a newspaper's April Fool's parody as a joke failed to raise a triable issue of fact as to the view of the average reader. Likewise, that a single individual might have recognized appellant's name during the episode does not affect our conclusion that the average and reasonable viewer of *Da Ali G Show* could not have understood Ali G's statements as assertions of fact.

Because appellant offered no evidence to create a triable issue of fact concerning whether Ali G's statements were reasonably susceptible of a defamatory meaning, the cases on which appellant primarily relies are unhelpful to her.[3] For example, in *Selleck v.*

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[3] Other cases appellant cites are antagonistic to her position or simply irrelevant. (See *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515,

Globe International, Inc. (1985) 166 Cal.App.3d 1123, 1131–1133, the appellate court reversed the dismissal of a libel claim which was based on an article titled "'Tom Selleck's love secrets—*By His Father*,'" that bore the caption "'His Father Reveals All,'" and contained quotations made by Selleck's father. The court determined that the title, caption and article did not merely express an opinion, but rather, asserted as a fact that Selleck's father made the statements concerning his son. (*Id*. at p. 1133.) In *Meyers v. Berg* (1931) 212 Cal. 415, 417–418, the evidence showed that the plaintiff's father-in-law repeatedly expressed hatred for her, including calling her a "'dirty bitch.'" The court observed that while the term "bitch" did not necessarily imply an unchaste and defamatory meaning, "if [the jury] should find that defendant had so referred to the plaintiff and intended thereby, under all the circumstances, to imply that she was an unchaste woman, and such statement was so understood by the person to whom it was spoken, a verdict should be found for the plaintiff." (*Id*. at p. 418.) Here, in contrast, there was no evidence that the character of Ali G was making assertions of fact, nor was there any evidence that those who heard Ali G's statements understood them to be assertions of fact.

Appellant's final argument that comedy may in some circumstances convey a defamatory meaning provides no basis for disturbing the judgment. (See *Polygram Records, Inc. v. Superior Court, supra*, 170 Cal.App.3d at p. 553.) Our determination is not premised on the notion that comedy is a protected form of speech. Rather, on the basis of the totality of the circumstances surrounding the statements and particularly "in light of the occasion at which the [statements were] delivered and the attending circumstances, we conclude that, as a matter of law, [the statements were] not defamatory. To hold otherwise would run afoul of the First Amendment and chill the

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529–531 [finding statements in an e-mail did not convey a defamatory meaning, where the plaintiff could not demonstrate the falsity of certain factual statements and other "undeniably derisive" satirical statements were nonactionable as a matter of law]; *Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 935–936 [parties agreed that the statement "'[o]ur dad's a pimp'" was defamatory and litigated whether it was true].)

free speech rights of all comedy performers and humorists, to the genuine detriment of our society." (*Id.* at p. 557.)

Our conclusion that Ali G's statements were not defamatory as a matter of law disposes of the entire complaint. (See *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265 ["liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication"]; *Couch v. San Juan Unified School Dist., supra,* 33 Cal.App.4th at p. 1504 [when tort claims "are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed"].) Appellant's causes of action for libel, slander, invasion of privacy, negligence and negligent infliction of emotional distress were all premised on injuries allegedly suffered from the broadcast of the episode. To the extent that appellant's remaining fourth and fifth causes of action for fraud and breach of contract contained additional allegations, those allegations were directed to avoiding the effect of the 2006 release on her other claims. Accordingly, those claims, too, are subject to summary judgment. (*Reader's Digest Assn. v. Superior Court, supra,* at p. 265; see also *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044–1045 ["logic compel[s] the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement"].)

In view of our conclusion, we need not address the alternative ground relied on by the trial court in granting summary judgment. (See *Pillsbury Co. v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 892, 894.)

DISPOSITION

The judgment is affirmed. Channel 4 is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST